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EY Submission
Revised exposure draft law for public country-by-country reporting

Dear Director

EY is pleased to provide comments in response to the revised exposure draft law (ED) for the proposed Australian public country-by-country (CbC) reporting (PCbCR) measures released for consultation on 12 February 2024 (*inserts for Treasury Laws Amendment Bill 2024: Multinational Tax Transparency – Country by Country Reporting Bill* and *draft Taxation Administration (Country by Country Reporting Jurisdictions) Determination 2024*).

We welcome the many updates made to the previous proposals in the April 2023 ED following consultation, in particular to allow aggregation of data in respect of certain tax jurisdictions, to refine the list of information required to be disclosed and to introduce a de minimis exemption. We also welcome the deferral of the measures by a year to now apply in respect of reporting periods commencing on or after 1 July 2024.

The proposed PCbCR measures will have a wide impact and affect both Australian multinational enterprises (MNEs) and foreign owned MNEs. Notwithstanding the revisions from the earlier ED, Australia's PCbCR regime will remain the most comprehensive public CbC reporting regime globally and additional extensive work will be required by covered groups to comply with the Australian obligations beyond those required in other jurisdictions.

We note the revisions more closely align the Australian requirements with the European Union's (EU's) PCbCR regime directive[1], however, there remain significant differences in the disclosure requirements and approach to providing data on a per jurisdiction basis which adds additional complexity and costs for MNEs operating in Australia. Further, the EU PCbCR regime directive is largely aligned with the disclosures in the current OECD BEPS Action 13 CbC report and we would welcome further global alignment of public CbC reporting requirements. The interest of reporting entities and the public would be served by a unified regime similar to the current CbC reporting regime.

[1] EU Directive 2021/2101

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While we advocate full international alignment, we anticipate that some differences are intentional and result from policy decisions made by the Australian Government. In this context our recommendations regarding alignment should help reporting entities manage the disclosures in a more efficient manner and reduce the costs of compliance.

Clarification of a number of aspects of the rules and guidance on their practical application is also required.

We set out in the Appendix our concerns and recommendations in respect of the revised ED in relation to:

Application

- The misalignment of Australia's $1 billion threshold with home jurisdiction CbC reporting thresholds which should be addressed in the amending law or through a class exception regulation/instrument.
- CbC reporting parents should be exempt from the provisions if the CbC reporting group does not have any foreign operations.
- Further guidance on determining whether the $10 million Australian source income de minimis threshold is met is needed and additional alternative balance sheet and number of employees measures should be considered for the de minimis rule.

Data to be reported

- The extensive list of specified jurisdictions for which data is required to be reported individually should be critically reviewed.
- Guidance is required for the ATO's application of exemptions where there are confidentiality concerns.
- Source of data requirements should align with BEPS Action item 13 and EU PCbCR directive approaches. This should allow MNEs to use consistent data sources which may not only come from the audited financial statements.
- Related party revenue disclosures should be aligned with how this is reported for confidential CbC reporting to reduce compliance costs.
- Only material items should be disclosed for the differences between income tax accrued and the amount of income tax due if the income tax rate applicable to the jurisdiction were applied to profit and loss before income tax item.
- Allowance should be made for voluntary additional supplementary explanations to be made in the form.
- Clarity is required in respect of reporting requirements for stateless entities and application to branches.
- EM comments concerning publishing links to the EU PCbCR directive report should be removed.

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Administration and other

- Format of the reporting mechanism should align with the EU PCbCR directive.
- Further guidance in the EM and from the Australian Taxation Office (ATO) is needed for other matters including requirements to amend data and application of penalties.

* * * * *

Should you have any queries with our submission or wish to discuss it in further detail please do not hesitate to contact either Tony Merlo (03 8575 6412, tony.merlo@au.ey.com), Alf Capito (02 8295 6473, alf.capito@au.ey.com) or Brian Lane (03 8650 7250 brian.lane@au.ey.com) in our Tax Policy Centre.

Yours sincerely

EY

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Appendix

1. Misalignment of Australia's $1billion threshold with home jurisdiction thresholds

A continuing concern is that the revised PCbCR proposal does not make an allowance for CbC reporting parents that do not meet the CbC reporting thresholds in their home jurisdiction.

Australia has one of the lowest, if not the lowest, CbC reporting threshold at A$1 billion aggregated turnover. This threshold is significantly lower than the threshold in many other jurisdictions. Accordingly some organisations may not have any CbC reporting requirements (public or confidential) anywhere in the world and will have to prepare all PCbCR information from scratch only for submission in Australia.

For example, based on current conversion rates the Australian threshold equates approximately to:

- 600 million EUR (EU PCbCR threshold is EURO 750 million) ie 150 million EURO below European trigger point
- 650 million USD (US CbCR threshold is USD 850 million) ie 200 million USD below trigger point.

Further, the EU PCbCR directive provides that EU ultimate parent undertakings are in scope if on their balance sheet date for *each of the last two consecutive financial years* total consolidated revenue exceeded EUR 750 million as reflected in their annual consolidated financial statements, compared to Australia's measurement on a year by year basis.

The OECD BEPS Action item 13 guidance supports an exclusion from completing a CbC report in a tax jurisdiction where the ultimate parent entity is not required to prepare a report in its home jurisdiction (where the filing threshold in the home jurisdiction is EUR 750 million or a near equivalent amount in domestic currency as of January 2015).[2]

For the confidential Subdivision 815E Income Tax Assessment Act (ITAA97) reporting obligations for CbC reporting entities the Commissioner has published on the ATO website a list of "fast-track" exemptions from lodging CBC reports (link) which the website information states (as of the date of this submission) can be self-assessed. This includes a one year exemption from lodging CbC reports where "The annual global income of your foreign CBC reporting parent is A$1 billion or more but falls below the CBC reporting foreign currency threshold in the jurisdiction of the foreign CbC reporting parent". This exemption is in line with the OECD guidance.

We note the proposed measures includes a number of provisions which allow exemptions to be provided including in paragraph 3D(1)(f) and subsection 3DB(4) of the Taxation Administration Act 1953 (TAA1953) for a class of entities to be exempt from having to

[2] Part IV, item 1 of OECD BEPS Action 13 Guidance on the implementation of country-by-country reporting, October 2022 update pg 22

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publish the selected tax information. This can either be done by legislative instrument or by regulation.

We recommend that an exemption from completing a PCbC report where the ultimate parent entity is not required to prepare a CbC report in its home jurisdiction is included in the package of amending law either in the amending provisions or in a regulation. Alternatively, the Commissioner should be directed to make this exemption through registering a legislative instrument as soon as possible after the proposals are enacted.

2. Exemption for Australia groups with no foreign operations

We recommend that CbC reporting parents should be exempt from the PCbCR provisions if the CbC reporting group does not have a constituent entity or permanent establishment outside of Australia (i.e., it has no "foreign operations"). This exemption should be included in the amending provisions.

To require such groups to report does not meet the objectives of the provisions including "to better assess whether an entity's economic presence in a jurisdiction aligns with the amount of tax they pay in that jurisdiction" and the scheme of the proposals to report on multinational groups as there are no other non-Australian jurisdictions to compare against.

Further, such groups would not currently prepare Subdivision 815E CbC reports in accordance with an ATO "fast track" self-assessed exemption.

We note such Australian companies (having total income equal to or exceeding $100 million for an income year) already have a selection of their income tax return information reported publicly by the ATO in accordance with section 3C of the TAA1953 (*Report of entity tax information* published on data.gov.au.)

3. De minimis exemption clarifications required and potential alternative measure

We welcome the proposed inclusion of an exemption from publishing PCbCR data if the aggregated turnover of a CbC reporting parent includes less than a total of $10 million of Australian-sourced income.

The rule encompasses a mix of concepts – aggregated turnover which refers to ordinary income that the entity receives in the income year in the ordinary course of carrying on a business (with various modifications) and is primarily an accounting concept and Australian sourced income which is a taxation concept.

This may cause some uncertainty in determining what is to be counted for the $10 million threshold. For instance, "income from an Australian source" could be interpreted in different ways including: Australian sourced income in line with the source rules; and Australian source income based on relevant tax treaties. That is, the income threshold in paragraph 3D(e) is not limited to income of taxpayers set out in paragraph 3D(d) and may include other *prima facie* Australian sourced income that is not captured in an Australian income tax return for various reasons (for example due to the operation of tax treaties).

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We recommend further guidance on determining whether the $10 million Australian source income de minimis is met is included in the EM and in ATO guidance.

We note that it would appear that the $10 million threshold is based on the threshold for small business entities set out in Division 328 ITAA97. This is to some extent consistent with the EU PCbCR directive, which specifies that subsidiaries and branches of groups whose ultimate parent entity is not in the EU are excluded if they are not "medium-sized" or "large" businesses as defined for EU directive purposes.

These EU rules provide that subsidiary entities are only covered if they meet two of three alternative measures of: turnover greater than EUR 10 million (individual Member States may increase this threshold up to EUR 15 million), balance sheet greater than EUR 5 million (individual Member States may increase this threshold up to EUR 7.5 million) or average number of employees exceeding 50. Branches are only covered if they exceed the turnover threshold. These thresholds are adjusted periodically and need to be implemented by individual Member States in domestic law.

We recommend similarly that additional alternative measures be considered for determining whether the de minimis exclusion applies, based on the net assets and employees of Australian subsidiary entities.

4. Specified jurisdictions

Requirements to compulsorily report data on a CbC basis applies to Australia and in respect of jurisdictions specified on the list in the draft determination.

We note the draft explanatory material (EM) statement that jurisdictions are listed because they "are associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities". The list aligns with the ATO international dealings schedule (IDS) list of specified countries (with EU countries removed). We note the IDS list has largely remained static for an extended period, despite significant changes in the global tax landscape as the result of the BEPS and BEPS 2.0 actions.

This approach is different to that of the EU PCbCR directive which requires reporting on a separate CbC basis for EU member states and for all jurisdictions included in Annex I (on the first of March of the financial year for which the report should be drawn up) and Annex II (on the first of March of the financial year for which the report should be drawn up for two years consecutively) of the EU lists of non-cooperative countries for tax purposes.

The EU's lists are based on extensive research and are reviewed and updated bi-annually. We note that the last update of the EU lists took place in February 2024 and for financial year 2024 there are 12 jurisdictions listed on Annex I and 8 jurisdictions that remained on Annex II for 2 consecutive years compared to the 41 specified jurisdictions for Australia's PCbCR. The Australian list is also significantly longer than the OECD list of uncooperative tax jurisdictions.

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We submit that it is important that the Australian specified jurisdiction list is reviewed critically prior to enactment and that such review is based on objective criteria.

5. Application of exemptions including where confidentiality concerns

EY and others have previously raised concerns that the PCbCR measures may lead to the inappropriate disclosure of commercially sensitive information.

We note the EM at paragraph 1.18 suggests that these concerns are to be dealt with by the potential application of exemptions included in the ED, by application to the ATO:

> *These exemption powers are necessary to ensure the Commissioner can respond to unforeseen circumstances where disclosure of particular information by a particular entity would be inappropriate. The Commissioner, in exercising these discretions, must have regard to the policy intent of this measure which is for selected tax information to be made available to the public in a central location in a standard format. It is expected these discretions will only be exercised in limited circumstances.*

While we welcome this potential exemption power we note this is another difference to the EU PCbCR directive which allows Member States to implement a safeguard clause. If this clause is implemented covered groups can determine to defer the disclosure of sensitive information for up to 5 years unless the disclosure is in relation to a jurisdiction included in the Annex I and II lists.

We recommend that the ATO provide guidance on circumstances in which an exemption might be provided on the basis of disclosure of inappropriate information as a priority matter.

6. Reporting requirements guidance needed

We recommend guidance is included either in the EM or in ATO guidance in respect of reporting requirements for stateless entities and application of the rules in respect of branches.

We note the ATO's guidance for Subdivision 815E CbC reporting specifies that entities in a group that are not resident of any jurisdiction for tax purposes are reported in a separate line. We presume such entities would also be reported for PCbCR as part of reporting for jurisdictions that are not on the list of specified entities and it would be helpful if this is made clear.

For branches there may be some practical issues with producing data on a separate jurisdiction basis given current Division 815E CbC reporting is done on an entity basis.

7. Source of data alignment with EU directive and OECD approach

The ED requires the information to be published to be based on the audited consolidated financial statements of the reporting entity or if there are no such statements then they

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must be based on amounts that would be shown in such statements, had the entity been a listed company and been required to prepared them.

We note that this requirement does not align with the requirements to produce data under the OECD BEPS Action 13 CbC reporting guidance nor for the Subdivision 815E CbC report which allow the use of a variety of sources of data, being from consolidation reporting packages, separate entity statutory financial statements, regulatory financial statements or internal management accounts or any combination of these sources, provided the data sources are used consistently from year to year.

Contrary to the comment in paragraph 1.34 of the EM, it also does not align with the EU PCbCR directive which refers to the general and specific instructions for filling in a CbC report under DAC 4 (Directive on Administrative Cooperation) which introduced the Action 13 CbCR in the EU. We refer you to Article 48c item 3 of the EU PCbCR directive which permits the information to be reported on the basis of the reporting instructions referred to in Annex III to Council Directive 2011/16/EU (OECD Action item 13 CbCR). There is no requirement under the EU directive that information then ties to audited consolidated financial statements.

The requirement to use audited financial statements for Australia's PCbCR will mean that a separate process may be required by covered groups to produce the information required for the PCbCR report even where the type of data to be provided is similar to CbC report and EU directive public CbC reports, with additional costs of compliance. This is at odds with comments in EM that the aims of PCbCR are intended to be achieved while minimising the compliance and administrative burden imposed on the CBC reporting parent.

We recommend that a more flexible approach to allowable sources of data is included in line with the CbCR and EU PCbC directive approach by aligning the source of data to BEPS OECD Action Item 13 and Subdivision 815E requirements. This could include a requirement to provide a brief description of the sources of data used in preparing the report and to explain any changes to data sources used in the previous report.

In addition, in relation to the use of consolidated financial statements, we note that:

- Some of the information required to be published is not included in financial statements, e.g. number of employees and revenue from related parties that are not tax residents of the jurisdiction
- Detail for the individual entities is not separately included in the consolidated financial statements.

As such, if the requirements remain based on the amounts in audited consolidated financial statements, we recommend updating subsection 3DA(6) to address these issues, including removing the reference to headcount as this will not be able to be sourced from the audited consolidated financial statements and providing clarification as to which financial statements (or data underlying these) should be used.

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8. Disclosure of related party revenue alignment required

The OECD BEPS Action 13 CbC reporting guidance and Australia's Subdivision 815E CbC report require disclosure of all related party revenue. MNEs have processes in place to identify this amount. The proposed disclosure of related party revenues from parties *that are not tax residents of the jurisdiction* creates significant complexities as the tax residency of entities is not typically captured in financial systems.

Furthermore, using a different definition from that used for OECD Action item 13 aligned including Subdivision 815E CbC reports will mean there are inconsistencies between the various reports provided to the ATO.

As such, we recommend aligning the PCbCR requirement in relation to related party revenue with OECD aligned and Subdivision 815E CbC reports. This will also mean that the public will have access to the same information that the ATO has access to, which in our view will improve the public confidence in our tax system.

9. Disclosure of differences between tax accrued and tax due based on profit/loss

For Australia and specified jurisdictions disclosure is required of the reasons for the difference between income tax accrued (current year) and the amount of income tax due if the income tax rate applicable to the jurisdiction were applied to profit and loss before income tax.

There is no detailed guidance in the EM on what disclosure is required and a strict reading of the provision may result in the disclosure of a significant amount of information in situations where the difference is not material or a specific reason for the difference is not material. We note the GRI standard includes some limited guidance for disclosure for this item including to group explanatory items into a generic category, such as 'other', if these items together do not exceed 10% of the difference.

For greater certainty and to keep the expected level of disclosure to a reasonable level of compliance we recommend that this item should specify that only *material* differences need to be explained. We also recommend that guidance is provided in the law and/or EM as to what is material and allow for immaterial explanations to be grouped.

We recommend that further guidance on what is material with examples should also be provided by the ATO as a priority issue.

10. ATO disclosure - Additional voluntary disclosures

It is to be expected that companies will be concerned about the manner in which the ATO will publish the PCbCR information. Of particular concern will be entities whose statistics may, on their own, raise concerns about the presence of business activities in certain jurisdictions, but with appropriate further explanation of their circumstances, these concerns can be readily allayed to the general reader. We consider this would assist in achieving the purpose

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of the disclosures by more fully informing the public reader of such reports, with the information contained in the single document.

Accordingly, we think it is very important that provision be made for additional voluntary disclosure of information to be made by the MNE and to be published by the ATO as part of the PCbCR report to provide further transparency and thereby avoid any misconceptions in the published data.

We recommend that the report include a free-text-field to allow up to for example 1,000 words for any additional information to be provided which would assist readers to understand the information in the report. We note such additional disclosure is allowed for the Division 815E CbC report.

11. Publishing of a link to EU directive Public CbC reports

Paragraph 1.32 of the draft EM states that if an EU PCbC directive report is prepared then the Australian PCbCR covered CbC reporting parent is expected to publish a link to or copy of that report. We note that the draft ED does not include such a requirement.

We recommend this EM paragraph is removed.

12. Form of lodgement

The current Australian CbC report related lodgements are all made in XML format, which is consistent with OECD guidance on the CbC report and is a good format for gathering and analysing information. It is, however, not ideal for publishing additional information such as written documents and we understand that the European Commission is currently considering requiring lodgement in "inline XBRL". This will allow for easier/better web publication and would be beneficial to both reporting entities and the public. This will also facilitate the creation of forms for multiple jurisdictions.

We recommend that the format of the lodgements is internationally aligned.

13. Further guidance required

There are several elements of the proposed rules and interactions with other Australian tax laws which require further guidance in the EM to assist covered groups to understand the requirements and to comply. This is particularly important for CbC reporting parents that are not Australian taxpayers.

We recommend further EM guidance should cover for example:

- Requirements to amend data to correct material errors including what materiality concepts will be applied for when amendment is required, especially given the potential significant financial penalties for failing to notify the Commissioner of such corrections on time
- Application of penalties – the EM should outline the operation of sections 8C and 8E of the TAA1953 to put covered groups on notice for the level of financial penalties

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which may be imposed for failure to provide the PCbCR and the potential for imprisonment for a third offence.

- This should include clarification of how penalties under these provisions are limited to Australian resident entities.

We recommend that the Commissioner should provide guidance on how he intends to administer the penalty provisions including both the operation of sections 8C, 8E and 8Y and the new 288-140 TAA1953.

We also recommend that the ATO should develop further general guidance as they did for Subdivision 815E, on each element of the provisions including each disclosure, for release as soon as possible after the law is enacted.